Supreme Court, U.S.
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No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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VICKI HOSKINSON through the personal representation of her estate, ROBERT FLEMING; DEBORAH CARLSON, GEORGE CARLSON, JR., STEPHANIE HOSKINSON, CARIE CARLSON, and BRIAN CARLSON,

Petitioners,

v.

STATE OF CALIFORNIA and ROBERT MCLEAN,

Respondents.

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On Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division Two

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## PETITION FOR A WRIT OF CERTIORARI

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53 pp

## I. QUESTIONS PRESENTED

1. Whether application of California law violates the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of the United States Constitution when such law abrogates rights guaranteed under the Arizona Constitution to Arizona residents who were injured in Arizona but could not sue California defendants in the Arizona courts for lack of personal jurisdiction.

2. Whether the California Court of Appeal's rejection of Petitioners' 42 U.S.C. section 1983 claim for a parole officer's release of and subsequent refusal to arrest an escaped parolee, despite knowing that injury to a child would result, conflicts with the law of several federal Circuits, all of which impose Section 1983 liability where the State creates or increases the danger faced by a victim.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Vicki Lynne Hoskinson, through the Personal Representation of Her Estate, Robert Fleming, Deborah Carlson, George Carlson, Jr., Stephanie

Hoskinson, Carie Carlson, and Brian Carlson (collectively the "Hoskinson Family") respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

## II. OPINIONS BELOW

The Opinion of the California Court of Appeal (App., *infra*, 1a-12a) is reported at 34 Cal.App.4th 1378 (1995), 41 Cal.Rptr.2d 63 (1995). The order of the California Supreme Court denying the Hoskinson Family's Petition for Review (App., *infra*, 13a) is unreported.

## III. JURISDICTION

The California Court of Appeal issued an opinion in this case on May 10, 1995. A timely Petition for Review of the California Court of Appeal decision was filed with the California Supreme Court on June 26, 1995. The California Supreme Court issued an order on August 10, 1995, denying the Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## IV. CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any

State deprive any person of life, liberty, or property, without due process of law . . . ."

Article IV, section 1, of the United States Constitution provides in relevant part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . ."

The Civil Rights Act of 1871, 42 U.S.C. section 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## V. STATEMENT

1. *Factual Background.* On May 16, 1984, after he served a partial prison sentence for child molestation, the State of California (the "State") released Frank Atwood ("Atwood") on parole. Based on the State's numerous psychiatric exams of Atwood, the State knew that Atwood had a history of pedophilia, violence and drug abuse. One of the conditions of Atwood's parole was that he remain in the State of California. Respondent Robert McLean

("McLean") was Atwood's parole officer.

In August, 1984, in violation of his parole, Atwood left California to visit Tucson, Arizona and Enid, Oklahoma. After a police computer search revealed that Atwood was a California parolee, the police in Enid, Oklahoma telexed the following information to officials in several states, including McLean:

> This Dept. is currently investigating a subject identified as Frank Jarvis Atwood . . . Info. received stated that subject came to our city via Arizona and New Mexico, spending approximately a week or two in Tucson, Arizona.

McLean admitted that he learned of the Oklahoma teletype on September 6, 1984.

On that same day, Atwood was physically present in McLean's office for a parole appointment and admitted that he had left the state. California Penal Code section 3059 expressly provides that a paroled prisoner who leaves the State "shall be held as an escaped prisoner and arrested as such." McLean released Atwood notwithstanding: (1) Atwood's admission that he had violated his parole by leaving the State's jurisdiction; and (2) a clear State mandate to arrest Atwood.

On September 6, Frank Atwood's father, John Atwood, also called McLean and confirmed that his son had left the State and further informed McLean that Frank Atwood had been alone with a five-year-old

child in Oklahoma, that Frank had sent this child a sexually explicit postcard, and that Frank had been carrying a four to five-inch knife on his waistband. Despite knowledge of this information, McLean refused to take any action to arrest Atwood.

Shortly thereafter, on September 12, 1984, Atwood failed to appear for his parole appointment with McLean. Two days later, on September 14, 1984, McLean searched Frank Atwood's room at his parents' home and found a six-inch-high stack of pornographic pictures depicting young boys. McLean later testified that Frank Atwood's possession of these photographs raised a very serious concern "that Frank Atwood was going to molest another child." Despite this concern, McLean again refused to take any action to arrest Frank Atwood.

Thus, in September 1984, the State: (1) knew Atwood had violated his parole by leaving the State; (2) knew he had been alone with young children and was in possession of child pornography; (3) was seriously concerned that Atwood was going to molest another child; and (4) knew Atwood had traveled to and had connections with Tucson, Arizona. Despite McLean's actual knowledge of this information, McLean released Atwood at the September 6 parole appointment and continued to refuse to take any action in the face of alarming facts demonstrating that action was required. McLean's release of Atwood and subsequent refusal to act permitted Atwood to remain at large.

On September 17, 1984, Frank Atwood, who had traveled once again to Tucson, Arizona, knocked eight-year-old Vicki Lynne Hoskinson off her bicycle with the

car he was driving. He then kidnapped, tortured, raped and murdered her. Vicki's body was not found until April of the following year.

2. *Proceedings Below.* On August 25, 1986, the Hoskinson Family filed suit against the State of California and Robert McLean in the Superior Court of the State of Arizona. The Arizona Superior Court dismissed the complaint on jurisdictional grounds. Review was sought through the Arizona courts and ultimately the United States Supreme Court which denied *certiorari* on December 2, 1991. On that same day, the Hoskinson Family filed their complaint in California, which complaint was later amended and is referred to hereinafter as the "Amended Complaint."

On April 3, 1992, the State and Robert McLean demurred to the Amended Complaint contending, *inter alia*, that California Government Code section 845.8 immunizes the State from liability.[1] The Hoskinson Family opposed the demurrer on, among others, the ground that the California immunity statutes provide

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[1] The California immunity statute provides in relevant part:

> Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

Cal. Gov't Code § 845.8.

no defense because Arizona law governs the outcome of this case, and the Amended Complaint adequately states a claim under Arizona law. The trial court sustained the demurrer to the State of California without leave to amend. The trial court did, however, sustain the demurrer to the claims against defendant Robert McLean with leave to amend.

On June 10, 1992, the Hoskinson Family filed a Second Amended Complaint asserting, among other causes of action, a civil rights claim against McLean pursuant to 42 U.S.C. section 1983. On August 14, 1992, McLean filed a Motion for Judgment on the Pleadings with respect to the civil rights claim, which Motion was granted by the trial court on November 2, 1992. (App., *infra*, 19a)

The Hoskinson Family appealed the trial court's ruling to the California Court of Appeal on the ground that, among others: (1) application of California immunity statutes to bar Arizona residents from seeking recovery for injuries which occurred in the State of Arizona violated the Due Process Clause of the Fourteenth Amendment; and (2) the Second Amended Complaint adequately stated a Section 1983 claim. On May 10, 1995, the Court of Appeal affirmed the trial court in an opinion which was certified for publication. (App., *infra*, 1a-12a)

On June 26, 1995, the Hoskinson Family filed a Petition for Review of the California Court of Appeal decision with the California Supreme Court. The State Supreme Court denied the petition on August 10, 1995. (App., *infra*, 13a)

## VI. REASONS FOR GRANTING THE PETITION

Courts have a constitutional obligation to remedy constitutional violations. The California Court of Appeal failed to satisfy that obligation in this case by applying California law to deny Arizona residents, who have absolutely no connection to the State of California, any remedy for injuries occurring in Arizona and for which Arizona law would otherwise provide relief. If allowed to stand, the California court's ruling would abrogate the rights of all nonresident victims who suffer injury as a result of the State's complete dereliction of its parole duty in violation of rights guaranteed by the Due Process Clause of the Fourteenth Amendment, as well as the Full Faith and Credit Clause. Summary reversal is warranted to correct this unconstitutional deprivation.

The Petition should also be granted because the California Court of Appeal's decision stands in stark contrast to recent decisions of several federal Circuit Courts of Appeals concerning the scope of liability under 42 U.S.C. Section 1983. The Courts of Appeals of the Second, Seventh, Eighth, Ninth and Eleventh Circuits, have allowed injured plaintiffs to recover under Section 1983 where the state actor played a part in creating or increasing the danger faced by a victim at the hands of a third party. Notwithstanding the fact that at least five federal Circuits have expressly recognized the creation of danger doctrine, the California Court of Appeal rejected the Hoskinson Family's claim under this theory. This case offers an appropriate opportunity for this Court not only to reverse the California court's conflicting decision but

also to provide guidance to lower courts concerning the scope of liability under 42 U.S.C. section 1983 following *DeShaney v. Winnebago County Dep't. of Social Serv.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

## VII. LEGAL DISCUSSION

### A. The California Court's Application of California Law to Arizona Residents in Abrogation of Rights Guaranteed Under Arizona Law Is Constitutionally Impermissible.

The California's court's extraterritorial application of California law to bar Arizona residents from obtaining any remedy for injuries that befell them in Arizona offends the United States Constitution. While this Court has not addressed the exact factual issue presented here, it has repeatedly made clear that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also Home Ins. Co. v. Dick*, 281 U.S. 397, 407-410, 50 S.Ct. 338, 74 L.Ed. 926 (1930). Absent this Court's review, the California court's deprivation of the Hoskinson Family's constitutionally protected rights will go unremedied.

The California courts provided the *only* forum in which these Arizona plaintiffs could have sought redress. The Hoskinson Family originally filed this action in the State of Arizona. At the State of California's request, however, the Arizona courts

concluded with an extraordinary degree of express disquietude that they did not have personal jurisdiction over California defendants. *Hoskinson ex. rel. Fleming v. State of California*, 168 Ariz. 250, 812 P.2d 1068 (1990), *cert. denied*, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991). This Court declined review of the jurisdictional issue. *Hoskinson, ex. rel. Fleming v State of California*, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991).

Having been forced to litigate this matter in California despite their complete lack of contacts with that state, the Hoskinson Family contended that Arizona law governs the outcome of this case under well-settled choice of law principles because: (1) the bulk of the events that gave rise to this lawsuit occurred in Arizona; (2) most of the witnesses are in Arizona; (3) with the exception of one plaintiff, all of the plaintiffs are residents of Arizona with no connection to California; and (4) Arizona has a strong interest in ensuring full compensation for citizens injured in its state.[2] *See, e.g., Restatement (Second) of Conflicts of Laws*, § 146 cmt. e (where conduct and personal injury occur in different states, the local law of the state of injury usually will be applied to determine most issues involving the tort); *Offshore Oil Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 168, 148 Cal.Rptr. 867 (1979) (situs of injury remains relevant consideration in determining applicable law).

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[2] Atwood was prosecuted and convicted in the Arizona courts for the murder of Vicki Hoskinson. Significantly, the California courts did not and could not claim the right to regulate the criminal aspects of this case and cannot legitimately claim to regulate the civil analog.

Arizona law guarantees the Hoskinson Family the right to recover damages, while California law, as decided by the court below, precludes any relief.

Indeed, the Arizona Constitution expressly provides: "The right of action to recover damages for injuries shall *never* be abrogated, and the amount recovered shall not be subject to any statutory limitation." Arizona Constitution, Art. 18, § 6 (emphasis added). Moreover, under Arizona law, the State and its agent McLean could be held liable for acts of gross negligence or reckless conduct. *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 267, 564 P.2d 1227 (1977).

In contrast, the California Court of Appeal has determined that California law immunizes the State and McLean from any liability no matter how egregious their conduct or how foreseeable the harm.

The application of California law, which conflicts with Arizona law, deprives these Arizona residents of any relief for injuries resulting from the California defendants' misconduct even though such relief is protected under the Arizona Constitution. Such deprivation is constitutionally impermissible under both the Due Process Clause and Full Faith and Credit Clause.[3]

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[3] In considering whether a state court's choice of law was constitutionally permissible in *Sun Oil v. Wortman*, 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988), this Court stated:

### 1. Application of California Law Which Abrogates the Rights of Arizona Residents Violates the Due Process Clause.

This Court has consistently recognized that the Due Process Clause operates as a check upon a State's choice of law decisions. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). As Justice Stevens stated in his concurring opinion, "it may be assumed that a choice-of-law decision would violate the Due Process Clause if it were totally arbitrary or if it were fundamentally unfair to *either* litigant." 449 U.S. at 326 (emphasis added). Thus, for example, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-823, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), this Court held that a Kansas court's choice of Kansas law violated the due process clause where: (i) over 99% of the leases at issue and some 97% of the class plaintiffs in the case had no apparent connection to the State of

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> The nub of the present controversy, in other words, is the scope of constitutionally permissible legislative jurisdiction, and it matters little whether that is discussed in the context of the Full Faith and Credit Clause, as the litigants have principally done, or in the context of the Due Process Clause.

486 U.S. at 730. Thus, the fact that the choice of law question was discussed below in the context of the Due Process Clause does not preclude an analysis and review of the issue under the Full Faith and Credit Clause.

Kansas; and (ii) where such law subjected the defendant corporation to greater liability than the laws of other States. This Court found the application of Kansas law to be unfair even though the defendant corporation owned property in Kansas and conducted substantial business there. 472 U.S. at 819, 822.

*Phillips*, like most cases analyzing the constitutionality of choice of law decisions decided by this Court, involved challenges brought by defendants. This Court, however, has expressly recognized that the Fourteenth Amendment protects "persons," not only "defendants," so that plaintiffs are equally entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. 482 U.S. at 810. As in *Phillips*, the application of California law to bar the claims of Arizona residents, who have absolutely no connection to California, would be fundamentally unfair and violates the Due Process Clause.

In striking down the application of Texas law to New York defendants in *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930), this Court stated:

> The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone. We need not consider how far the state may go in . . . refusing to lend the aid of its courts to the enforcement of rights acquired outside its borders. It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

281 U.S. at 410.

The Hoskinson Family stand in a similar posture: they were left with no choice but to file suit in California due to the State's successful challenge on jurisdictional grounds. The Hoskinson Family here also desired simply to be left alone. Having had injuries visited upon them by the California defendants' dereliction of their parole duties, however, it would be fundamentally unfair to allow California to invoke its own laws as a shield to liability. California's attempts to abrogate the rights of residents beyond its borders who bear no relation to that State violates the Due Process Clause and simply cannot stand.

Indeed, if left unaddressed, the California court's decision sets a dangerous precedent because it allows the State to completely abdicate all responsibility for those dangerous felons it has chosen to parole with impunity and without regard for injuries to innocent victims in other states that are certain to occur. Absent review by this Court, the California court's ruling would force all non-California residents, who, like the Hoskinson Family, have absolutely no connection with the State of California, to alone bear the burden of loss as a result of wrongs committed by the State and its agents. Such a manifest injustice cannot go unremedied.

### 2. Application of California Law to Bar Rights Guaranteed Under the Arizona Constitution Violates the Full Faith and Credit Clause.

The Full Faith and Credit Clause imposes on the courts of one state the duty to enforce the laws of another. *Alaska Packers Ass'n v. Indus. Accident Comm'n of California*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). In *Alaska Packers*, this Court expressly recognized that the general principle allowing a state to enforce its own laws in its courts is overcome on a "showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." 294 U.S. at 547-548.

Arizona's legitimate interest in providing its citizens full compensation for injuries occurring in Arizona provides more than a rational basis - indeed, Arizona's interest provides a compelling reason - for requiring application of Arizona law here. Arizona's interest in providing a remedy to its citizens in this instance is far superior to California's desire to shield itself from liability for its complete abdication of responsibilities for its paroled felons.

Indeed, in recognition of a state's interest in ensuring full compensation for its citizens, this Court rejected the State of Nevada's claim that its statute limiting damages recoverable from Nevada to $25,000 should apply to California residents injured by a Nevada official in California. *See Nevada v. Hall*, 440

U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). As this Court stated:

> In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

440 U.S. at 426.

The people of Arizona, including the Hoskinson Family, have had no voice in California's decision to grant itself broad immunity for injuries caused by its parolees. In slight mitigation of this blanket immunity, California has seen fit to enact the Victims of Crime Assistance Act (the "Act"), Cal. Gov't Code § 13959, which provides some recompense to California residents unfortunate enough to suffer injury as a result of the failure of the State's parole system.[4] While California residents have consented to blanket immunity ameliorated only by the limited remedies

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[4] Significantly, benefits under the Victims of Crime Assistance Act are not available to nonresidents like the Hoskinson Family. Thus, California seeks to deny nonresidents any remedy by its invocation of immunity statutes here even though, in similar circumstances, it would provide its own residents some restitution.

provided under the Act, Arizona residents have not. Rather, Arizona residents have adopted an entirely different system which affords constitutional protection to a plaintiff's right to seek full recovery.

Arizona's decision to afford such constitutional protection to its residents is deserving of the same, if not more, respect as California's decision to provide for immunity under the circumstances here. The California court violated the Full Faith and Credit Clause in refusing to allow the Hoskinson Family to proceed on their claims under Arizona law. Accordingly, the lower court's decision is unconstitutional and should be reversed.

### B. The California Court of Appeal's Rejection of the Hoskinson Family's Section 1983 Claim Conflicts with the Law of Five Federal Circuits.

Following this Court's decision in *DeShaney v. Winnebago County Dep't. of Social Serv.*, 489 U.S. 187, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), a number of federal Circuit Courts of Appeals have found that Section 1983 liability attaches where a state actor plays a role in creating or increasing the danger faced by a plaintiff at the hands of a third party, and as a result of which the plaintiff is injured.

This creation of danger doctrine has been recently recognized, for instance, by the Seventh Circuit in *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993), wherein the court reversed dismissal of a Section 1983 claim, holding that plaintiffs "may state claims for civil

rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that they otherwise would have been."

Other federal Circuit Courts are in accord in allowing plaintiffs to pursue section 1983 claims under the creation of danger doctrine. *See, e.g., Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (upholding civil rights claim against police officers for not intervening in skinheads' beating of plaintiff); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (upholding claim where police officer failed to enforce restraining order against husband who murdered wife and child due to police chief's relationship with husband); *Wood v. Ostrander*, 879 F.2d 583, 589-590 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) (dismissal of Section 1983 claim reversed because genuine issue of fact existed as to whether state conduct had "placed the plaintiff in a position of danger"); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989) *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed. 2d 785 (1990) (upholding Section 1983 claim, noting issues of material fact existed as to whether town and prison officials created a dangerous situation when they assigned inmates to work squad with inadequate supervision).

**1. The Hoskinson Family Has Stated a Section 1983 Claim Under the Creation of Danger Doctrine.**

In affirming dismissal of the Hoskinson Family's section 1983 claim, the California Court of Appeal's

decision directly contradicts overwhelming federal authority which recognizes liability in this instance under the creation of danger doctrine.

In *Reed*, the Seventh Circuit imposed liability based on facts analogous to those presented here. In that case, a police officer arrested a sober driver and left behind an intoxicated passenger who took the wheel and then crashed into plaintiff's car. *Reed*, 986 F.2d at 1124. The court found liability under Section 1983 on the ground that it was "the police action in removing [the driver], combined with their knowledge of [the passenger's] intoxication which creates their liability for the subsequent accident. *Id.* at 1125.

McLean's release of Atwood at the September 6 parole meeting and his subsequent failure to arrest Atwood was the equivalent of the officer's conduct in *Reed*: in both instances the state actor allowed an obviously dangerous person free rein to injure others. The Second Amended Complaint alleges that Atwood's father told McLean on September 6 that Atwood had been alone with a five-year-old child in Oklahoma to whom Atwood had sent a sexually explicit postcard, and had been seen carrying a four or five inch knife, all of which were parole violations. The Second Amended Complaint also alleges that McLean later found pornographic pictures of young boys in Atwood's room.

As in *Reed*, McLean's release of Atwood at the September 6 parole appointment and his subsequent refusal to take any action to arrest Atwood, combined with his knowledge of these alarming facts

demonstrating that action was required, creates liability here for the harm that befell the little girl.

As the Seventh Circuit noted in *Reed*, "[c]ertainly the Reeds are worse off with a drunk driver heading toward them than a sober one." *Reed*, 986 F.2d at 1125. McLean's conduct in first releasing and then later failing to arrest Atwood, despite knowing that he had recently traveled out of State and would likely injure another child, similarly placed Vicki Hoskinson in a worse position than she otherwise would have been. McLean's callous disregard for Vicki Hoskinson's bodily security gives rise to a violation of 42 U.S.C. section 1983.

### a. Liability Under Section 1983 Does Not Require an Identifiable Victim.

The California court's decision was based, in part, on the erroneous premise that the victim must be known to the state actor for Section 1983 liability to attach. (App., *infra*, 10a) The Seventh Circuit Court of Appeals, however, has expressly held that Section 1983 does not require the identity of the victim to be known. As the *Reed* court stated:

> When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party.

*Reed*, 986 F.2d at 1127. Similarly, in *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 (7th Cir. 1990), the court upheld a Section 1983 claim against a municipality which had declared a police officer unfit for duty and prohibited him from carrying a gun, yet failed to recover the gun from the officer, which the officer later used to shoot a random member of the community. In imposing liability, the Seventh Circuit recognized that "some types of injuries, by their very nature, will choose their victims at random." *Id.* at 1521-22, n. 19.

In each of these cases, the court upheld the plaintiff's Section 1983 claim even though each was a random victim whose identity was unknown to the state actor at the time of the misconduct. As *Reed* makes clear, liability turns on the misconduct of the state actor and not the identity of the victim. The California court's ruling contravenes federal authority directly on point and therefore should be reversed.

**b. Liability Under Section 1983 Does Not Require the State Actor Either to Sanction the Third Party Misconduct which Causes Injury or to Place the Victim in Harm's Way.**

The California court also rejected the Hoskinson Family's Section 1983 claim based on its finding that McLean did nothing to sanction Atwood's acts or to place him near Vicki Hoskinson, purporting to distinguish *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) *cert. denied*, ___ U.S. ___, 113 S.Ct. 2442, 124 L.Ed.2d 660

(1993). (App., *infra*, 10a.) In *Grubbs*, a prison nurse who was assigned to work alone with an inmate known to be violent toward women successfully stated a claim under Section 1983 after being raped by the inmate. 974 F.2d at 120, 122. Contrary to the California court's ruling, *Grubbs* did not require the state actor to sanction the inmate's attack for Section 1983 liability to attach. Rather, the court allowed the nurse to state a Section 1983 claim on the basis that she "seeks to make Defendants answer for their acts that independently created the opportunity for and facilitated [the inmate's] assault on her." *Id.* at 122.

Nor does the state actor have to place the victim in harm's way. As the Seventh Circuit has made clear, "officers may be subject to liability under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger." *Reed*, 986 at 1127. Indeed, the Seventh Circuit, as well as the Second Circuit, have also found that Section 1983 liability may attach where a state's *failure* to act creates a dangerous situation that leads to plaintiff's injury at the hands of a third party. *See, e.g., Gibson*, 910 F.2d at 1521 (Section 1983 claim upheld where liability was based on state's failure to take away gun from police officer who was declared unfit for duty and who later shot plaintiff's decedent); *Dwares v. City of New York*, 985 F.2d 94 (Section 1983 claim upheld where police failed to intervene when skinheads assaulted plaintiff).

McLean's actions in releasing Atwood at the September 6 parole appointment and subsequent refusal to arrest him, despite being under a State mandate to do so and knowing that Atwood would

injure another child, created the opportunity for Atwood to travel to Tucson once again, where he kidnapped, raped and murdered Vicki Hoskinson.

On these facts, the California court's finding that McLean did not create or increase the danger which led to the little girl's injury (App., *infra*, 11a) is unsupportable and should therefore be reversed.

### 2. This Case Provides the Court An Opportunity to Provide Guidance to Lower Courts Concerning the Scope of Section 1983 Liability Following *DeShaney*.

The Circuit Courts' pronouncements concerning the creation of danger doctrine answer the question explicitly left open by this Court in *DeShaney*. *DeShaney* did not address the issue of whether Section 1983 liability attaches where the state creates a dangerous situation or renders citizens more vulnerable to danger. *DeShaney*, 489 U.S. at 201; *Reed*, 986 F.2d at 1124. In fact, the petitioners in *DeShaney* had conceded that the state played no part in creating the danger to the child who was beaten by his father, and thus this Court noted that "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" 489 U.S. at 201 (emphasis added).

At least five federal Circuit Courts have answered the question left open in *DeShaney* with a resounding yes by recognizing the creation of danger doctrine. Accordingly, the California Court of Appeal's

decision to the contrary simply cannot stand. The instant case not only allows this Court to remedy the plain error of the court below but also provides an appropriate opportunity to provide lower courts with guidance concerning the scope of liability under 42 U.S.C. section 1983 following *DeShaney*.

## VIII. CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the California Court of Appeal should be summarily reversed.

Respectfully submitted.

Hennigan, Mercer & Bennett
J. Michael Hennigan
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017
(213) 694-1200
Counsel for Petitioners

November 7, 1995

# APPENDIX A

## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## SECOND APPELLATE DISTRICT

## DIVISION TWO

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B 0744575

(Super. Ct. No. BC 043375)

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VICKI LYNNE HOSKINSON, et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

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FILED May 10, 1995

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Berg, Judge. Affirmed.

Howrey & Simon, J. Michael Hennigan, John L. Amsden, Mary H. Chu for plaintiffs and Appellants.

Daniel E. Lungren, Attorney General, Robert H. Francis, Supervising Deputy Attorney General, Edward H. Ochoa, Deputy Attorney General for Defendants and Respondents.

Plaintiffs Robert Fleming, as personal representative of the estate of Vicki Lynne Hoskinson, and members of Hoskinson's family (Deborah Jane Carlson, George Glenn Carlson, Jr., Stephanie Dawn Hoskinson, Carie Lynn Carlson, and Brian William Carlson) appeal from the dismissal of their action against the State of California and its parole officer Robert McLean for failure to prevent the brutal and tragic murder of Vicki by Frank Atwood, a parolee. The trial court sustained both defendants' demurrers primarily on grounds of immunity. Plaintiffs contend:

"[I.] The first amended complaint adequately alleges claims against the state for failing to perform the mandatory and statutory duty to arrest Frank Atwood. [II.] The trial court erred in dismissing plaintiffs' claims because the state's conduct also gives rise to liability under Arizona law. [III.] The second amended complaint adequately alleges a claim for violation of civil rights under 42 U.S.C. section 1983. [IV.] California governmental immunity statutes do not apply to federal civil rights claims in state court."

Plaintiffs first sued in an Arizona court, where their action was dismissed for lack of personal jurisdiction. Plaintiffs then filed the present action. Their first amended complaint alleged counts for violation of civil rights, failure to perform a mandatory duty, and negligence against these defendants. The

state's demurrers to the first amended complaint were sustained without leave to amend.

McLean's demurrers were sustained with leave to amend. Plaintiffs filed a second amended complaint, alleging civil rights violations and wrongful death against McLean. The trial court sustained McLean's demurrer to the negligence claim only without leave to amend. McLean answered the civil rights count and moved for judgment on the pleadings. The trial court granted the motion. This appeal followed.

## FACTS

In our view, we assume the truth of all facts properly pleaded. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318; Ramirez v. USAA Casualty Ins. Co. (1991) 234 Cal.App.3d 391, 397.)

On May 16, 1984, Frank Atwood was paroled from a California state prison. He had a history of pedophilia, violence, and drug abuse. The conditions of Atwood's parole included that he remain within the borders of California and that he not associate with children.

In August 1984, in violation of his parole, Atwood visited Tucson, Arizona, and Enid, Oklahoma. The police in Enid notified defendants that Atwood was in Oklahoma in violation of his parole.

On September 6, 1984, in California, Atwood admitted to McLean that he had left the state without permission. Later that day, Atwood's father told McLean that Atwood had been alone with a five-year-old child, that he had sent a sexually explicit postcard to the child, and that Atwood had been carrying a five-inch knife.

On September 12, Atwood told McLean he would miss his weekly parole appointment because of an eye injury. McLean told Atwood of his father's accusations, and Atwood denied them.

On September 13, Atwood's parents banished him from their home. Atwood went to Tucson. On September 14, McLean searched Atwood's room in Los Angeles and found a stack of child pornography. Atwood's mother told McLean that Atwood was out visiting friends. Despite their knowledge of Atwood's antisocial behavior and parole violations in August and September, defendants failed to take steps to cause Atwood to be arrested.

On September 17, in Tucson, Atwood kidnapped, tortured, raped, and killed Vicki.

On September 18, McLean called Atwood's parents, who told him Atwood had moved in with friends in the Los Angeles area. McLean instructed Atwood's mother to have Atwood contact him by September 20.

On September 20, 1984, Atwood's father told McLean that Atwood was in Kerrville, Texas. Atwood was arrested in that city on a date and for reasons unspecified in the complaint. He was convicted in Arizona of kidnapping and murder in March 1987, and sentenced to death.

## DISCUSSION

### 1. Governmental Immunity

Plaintiffs' first contention, that defendants are not immune from liability, lacks merit. Both our Legislature and the courts have squarely rejected public

liability for harm resulting from the failure to properly supervise a parolee.

Defendants are immunized by section 845.8 of the Government Code, which provides in relevant part, "Neither a public entity nor a public employee is liable for: [¶] (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." In addition, section 846 of the Government Code states, "Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody." These statutes are clear and govern this case.

Our Supreme Court stated in Thompson v. County of Alameda (1980) 27 Cal.3d 741, 753-754: "By their very nature parole and probation decisions are inherently imprecise . . . . [A] large number of parole violations occur. . . . Although we fully recognize that not all violations involve new or violent offenses, a significant proportion do. [¶] Notwithstanding the danger illustrated by the foregoing statistics, parole and probation release nonetheless comprise an integral and continuing part in our correctional system authorized by the Legislature, serving the public by rehabilitating substantial numbers of offenders and returning them to a productive position in society."

In a case very similar to this one, Brenneman v. State of California (1989) 208 Cal.App.3d 812, the plaintiffs alleged that their child had been molested and murdered by a parolee. The appellate court upheld demurrers despite allegations of negligent supervision

of the parolee and breach of a mandatory duty to conduct a reassessment of his risks and needs, stating that the allegations fit "squarely under Government Code section 845.8, subdivision (a)." (Id. at p. 821; see also Duffy v. City of Oceanside (1986) 179 Cal.App.3d 666 [no liability for failure to properly supervise parolee]; Martinez v. State of California (1978) 85 Cal.App.3d 430 [no liability for failure to properly supervise parolee]; Whitcombe v. County of Yolo (1977) 73 Cal.App.3d 698 [no liability for failure to investigate and report probation violations to court].)

Plaintiffs attempt to avoid the obvious import of the statutes and case law by asserting an exception, breach of a "mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury [and that] an injury of that kind [was] proximately caused by its failure to discharge the duty . . . ." (Gov. Code, § 815.6.) They urge that defendants were required to arrest Atwood by section 3059 of the Penal Code, which provides, "If any paroled prisoner shall leave the state without permission of the Board of Prison Terms, he shall be held as an escaped prisoner and arrested as such."

We disagree. A mandatory duty is one "which a governmental entity is required to perform, as opposed to a permissive power which a governmental entity may exercise or not as it chooses." (Morris v. County of Marin (1977) 18 Cal.3d 901, 908) Penal Code section 3059 does not specify who must arrest the parolee, or how long he must be held after his arrest. Moreover, the provision is part of a statutory scheme characterized by the broad discretion of the parole authority. (See In re Powell (1988) 45 Cal.3d 894, 902.)

Under the circumstances, it is not reasonable that "the Legislature intended to impose a duty which would provide a basis for civil liability. [Citations.]" (State of California v. Superior Court (1992) 8 Cal.App.4th 954, 958; and see Zolin v. Superior Court (1993) 19 Cal.App.4th 1157, 1166.)

Plaintiffs' position fails for a second reason. Liability under Government Code section 815.6 arises only where the statute creating the duty is designed to protect against the injury which occurs. The sparse legislative history involving paroles shows that Penal Code section 3059 was not intended to protect the public against the risk of criminal attack by a parolee who leaves the state without permission. Rather, the provision is aimed at keeping the parolee available to meet with the parole officer by subjecting him or her to arrest as an escapee.

Moreover, the alleged breach was not a legal or proximate cause of plaintiffs' injuries, as required by the statute. "Proximate cause is 'that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury . . . and without which such result would not have occurred.' [Citation.]" (State of California v. Superior Court (1984) 150 Cal.App.3d 848, 857.) Here, the failure to arrest Atwood was not in itself a cause of the injury, since arrest without a period of incarceration would not necessarily have prevented the crime. Incarceration, however, would have involved procedural steps involving the exercise of discretion and thus have broken the causal chain. (State of California v. Superior Court, supra, at pp. 858-859.)

Plaintiffs also have failed to show any violation of the privileges and immunities clause of Article Four of the Constitution of the United States. We fail to see how the provisions of the Victims of Crime Act (Gov. Code, §§ 13959 et seq.), which provide restitution assistance for California residents but not for non-residents, could transform the state's traditional immunity from liability into unconstitutional activity. (See Ostrager v. State Board of Control (1979) 99 Cal.App.3d 1 [rejecting challenges to Victims of Crime Act on Privileges and Immunities and Equal Protection grounds].)

2. Choice of Law

Plaintiffs' second contention, that the trial court erred in applying California law, also lacks merit. They have cited no case which stands for the proposition that when a state is sued in its own courts, it cannot claim the benefit of its own law of sovereign immunity. We are disinclined to create such a startling proposition on our own.

Denham v. Farmers Ins. Co. (1989) 213 Cal.App.3d 1061, relied upon by plaintiffs, is distinguishable. There, the parties were all private citizens with the plaintiff residing in California and the defendant in Nevada. The subsequent bad faith claim against defendant's insurer involved a choice of law question as to whether to apply California law (which allowed third party bad faith claims) or Nevada law, which did not. The appellate court concluded that because (1) the accident happened in Nevada, and (2) Nevada had an interest in regulating and controlling the actions of its insurance companies, Nevada law

should apply. In the case before us, however, the actions complained of occurred in California by a governmental entity and employee.

In Hall v. University of Nevada (1977) 74 Cal.App.3d 280, also relied upon by plaintiffs, a Nevada State employee driving a vehicle owned by the state of Nevada was involved in a collision with a California resident in California. The appellate court rejected the contention that would have limited the defendant to Nevada's maximum liability of $25,000. The court held that California's interest in providing full protection to people injured on its highways outweighed Nevada's policy of limiting the liability of its residents.

In the present case, however, the acts of the state were carried out within its own jurisdiction in the furtherance of a strong public policy for parole and and [sic] governmental immunity, thus supporting the conclusion that the applicable law here is that of California.

3. Due Process

Plaintiffs' third contention is unavailing. They assert they were deprived of their due process rights (42 U.S.C. § 1983) by McLean's failure to arrest Atwood, his release on parole, and McLean's failure to make mandatory home visits and to follow other mandatory provisions of California's parole procedures manual. These failings, however, are insufficient to remove this case from the general rule that members of the public have no constitutional right to recover damages from state employees who fail to protect them from harm inflicted by third parties. (DeShaney v. Winnebago

Cty. Soc. Servs. Dept. (1989) 489 U.S. 189 [no liability for failure of social workers to remove child from custody of abusive father].)

Moreover, Atwood did not identify the decedent as the target of his violence. There was no relationship between the state and the victim which would provide a basis for liability. (See DeShaney v. Winnebago Cty. Soc. Servs. Dept., supra, 489 U.S. 189, 197-199.)

Freeman v. Ferguson (8th Cir. 1990) 911 F.2d 52, relied upon by plaintiffs, is distinguishable. There the court remanded to allow the plaintiffs an opportunity to plead affirmative acts by a police chief in aid of his friend, the murderer, to show "that the violence the decedents were subjected to was not solely the result of private action, but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available . . ." (Freeman v. Ferguson, supra, 911 F.2d at p. 54.) Here, by contrast, McLean neither acted to create the danger, nor defeated anyone's chance for self-protection.

In L.W. v. Grubbs (9th Cir. 1992) 974 F.2d 119, also relied upon by plaintiffs, the court held that where the defendants knew that an incarcerated third party "had an extraordinary history of unrepentant violence against women and girls," and nevertheless assigned him and the plaintiff, a nurse, to work together by themselves after assuring plaintiff that she would not be working alone with violent offenders, they created the danger to which she fell victim. (Id. at p. 121.) By contrast, in this case McLean had no hand in placing the decedent near Atwood and did nothing to sanction his acts.

4. Federal Civil Rights Claim

In light of our holding regarding plaintiffs' claim for violation of their civil rights (42 U.S.C. § 1983), we need not address their fourth contention, that California's governmental immunity statutes do not apply to federal civil rights claims.

5. Tort Claim Act

Defendants assert that plaintiffs failed to comply with the Tort Claims Act. (Gov. Code, §§ 900 et seq.) Plaintiffs alleged compliance based upon the unavailability of information while the criminal prosecution was pending and their prosecution of an Arizona suit against the same parties and for the same relief from August 1986 until December 1991. Although it was raised below, the trial court apparently did not reach that issue. In light of our decision on plaintiffs' assignments of error, we need not address whether they have sufficiently pleaded tolling.

## DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/
NOTT, J.

We concur:

/s/
BOREN, P.J.

/s/
FUKUTO, J.

## APPENDIX B

Second Appellate District, Division Two

IN THE SUPREME COURT OF CALIFORNIA

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B074475 and S047240

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VICKI LYNNE HOSKINSON, Et Al.,
Appellants

v.

STATE OF CALIFORNIA Et Al.,
Respondents

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FILED August 10, 1995

Appellants' petition for review DENIED.

LUCAS
Chief Justice

## APPENDIX C

Dept. 15
Date: May 6, 1992
Honorable MICHAEL BERG, Judge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

| | |
|---|---|
| VICKI LYNNE HOSKINSON, etc., et al., Plaintiffs, vs. STATE OF CALIFORNIA, CALIFORNIA STATE DEPARTMENT OF CORRECTIONS, CALIFORNIA BOARD OF PRISON TERMS, ROBERT McLEAN, JANE DOE McLEAN, et al., Defendants. | CASE NO. BC043375 |

RULING ON SUBMITTED MATTER: DEFENDANTS', STATE OF CALIFORNIA etc., DEMURRER TO THE FIRST AMENDED COMPLAINT. (Taken under submission by the Court on April 29, 1992)

The Court now renders the following ruling on the matter previously taken under submission by the Court on April 29, 1992:

STATE'S DEMRRER [sic] IS SUSTAINED WITHOUT LEAVE TO AMEND AS TO ALL CAUSES OF ACTION AGAINST THE STATE.

If this crime had been committed in California, Government Code Section 845.8, which grants a public entitity [sic] immunity for any injury resulting from the determination of whether or not to parole or to revoke parole, would provide immunity for the State and for parole agents.

Penal Code Section 3059 reads[sic] in conjunction with Government Code Section 845.5 indicates that the state had a "discretionary" duty and not a mandatory duty to revoke parole here. Also See: Penal Code Section 3060 and Section 3063 and cases in annotations referring to broad discretionary powers over parolees. e.g. In re: Dunham (1976) 16 Cal 3d 63. Also See Moving party's points and authorities on this issue. See: Brenneman Vs. State of California (1989) 208 C.A. 3d 812, 820.

WITH RESPECT TO THE FIRST CAUSE OF ACTION AGAINST THE INDIVIDUAL PAROLE AGENT, ROBERT McLEAN, THE DEMURRER IS SUSTAINED WITH 20 DAYS LEAVE TO AMEND the Civil Rights cause of action with more specificity as to the dangerous condition caused by McLean creating a Civil

Rights Violation. 20 DAYS IS GRANTED TO RESPOND TO ANY AMENDED COMPLAINT.

If amended, parties should also address next time the issue of causation. See: discussion in Martinez Vs. State of California 100 Sup. Ct. 553, 559

Must there be a risk to a specific victim as opposed to the general danger to the public at large posed by a parolee?

A copy of this minute order is sent to counsel and defendant, In Pro Per, moving party on this date as addressed below:

[cc: John L. Amsden
David C. Olson
Frank Jarvis Atwood
Samuel J. Gesten]

## APPENDIX D

Dept. 15
Date: July 28, 1992
Honorable MICHAEL BERG, Judge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

VICKI LYNNE HOSKINSON,
Plaintiffs,
vs.
STATE OF CALIFORNIA, ETC., ET AL.,
Defendants.
) CASE NO. BC043375

NATURE OF PROCEEDINGS:

1. DEFENDANT ROBERT McLEAN'S NOTICE OF DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT; ETC., ET AL.,
2. DEFENDANTS JOHN ATWOOD AND ALICE ATWOOD'S NOTICE OF HEARING ON DEMURRER AND DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT; ETC.,

Demurrer of defendant McLean is argued the Court rules as follows: 4th Cause of Action sustained without leave as pursuant Moving Party's points and authorities. 1st Cause of Action overruled since not now addressed by Moving party.

Demurrer of defendants Atwood is argued and the Court rules as follows: The 2nd, 3rd and 4th Causes of Action is sustained without leave as pursuant to Moving Party's points and authorities,

The Clerk is directed to send a copy of this minute order addressed as follows:

[cc: John L. Amsden
David C. Olson
N.B. Peek]

## APPENDIX E

Dept. 15
Date: November 2, 1992
Honorable MICHAEL BERG, Judge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

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|---|---|
| VICKI LYNNE HOSKINSON, etc., et al., Plaintiffs, vs. STATE OF CALIFORNIA, CALIFORNIA STATE DEPARTMENT OF CORRECTIONS, CALIFORNIA BOARD OF PRISON TERMS, ROBERT McLEAN, JANE DOE McLEAN, et al., Defendants. | CASE NO. BC043375 |

RULING ON SUBMITTED MATTER: DEFENDANT, ROBERT McLEAN'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Court now renders the following ruling on the matter heretofore taken under submission on September 16, 1992:

DEFENDANT, ROBERT McLEAN'S MOTION FOR JUDGMENT ON THE PLEADINGS IS GRANTED, for the reasons set forth in the moving papers. DeShaney Vs. Winnebago/County Department of Social Services U.S. 109 S. Ct. 998 (1989) is controlling. The State did not single out plaintiff's decedent to be denied protection from defendant Atwood nor were they aware of any special danger facing her, an unidentifiable victim. Moreover, there is nothing to suggest that the plaintiff's decedent specifically faced any special danger. See: Cornelius Vs. Town of Highland Lake, 880 F. 2d 348, 356 (11th Cir. 1989), regarding the distinction between a detainee as opposed to parolee or releasee. The Complaint indicates that after the time the defendant was in the agent's office additional facts regarding certain dangerous activity by defendant were provided by defendant's father to the agent. See: page 17 paragraph number 48, second amended complaint. The cases cited to be[sic] moving party McLean dictate dismissing the Section 1983 Due Process Violation claim.

A copy of this minute order is sent to counsel and defendant, In Pro Per, via U.S. Mail on this date as addressed below:

[cc: John L. Amsden
David C. Olson
Frank Jarvis Atwood
Samuel J. Gesten]